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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 394

CULLEN HUCKABY
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 9, 1968

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WO. 2-8745—WO. 2-8732

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Cullen Huckaby, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction entered by the United States District Court for the Eastern District of Michigan, Southern Division, on May 26, 1966.

OPINIONS BELOW

No opinions were rendered by the lower courts.*

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1968. This petition was filed on August 9, 1968. The Court of Appeals has stayed its mandate until August 14, 1968. The jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when the government avoids disclosing the source of the information leading to the discovery of the offense, a presumption arises that the source of the information was the fruit of unlawful electronic surveillance.

2. Whether, when government agents suspect petitioner of violating gambling laws, may they indict and convict him of the violation of internal revenue laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 USC, Sec. 605; Sec. 5179 (a) (1), 5205 (a) (2), 5222 (a) (1), 5601 (a) (1), 5601 (a) (7), 5604 (a) (1) and 5681 (c) of Title 26, USC.

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* Oral opinion of trial judge—appeal 18,759.

The Constitutional provisions involved are the fourth, fifth and sixth amendments to the Constitution of the United States of America.

The statutory and Constitutional provisions are printed in Appendix A, *infra*, p. 1a, *et seq.*

STATEMENT

Introduction

Petitioner was convicted upon his plea of not guilty by a jury under the sections of Title 26, USC, *supra*, of the offense of possession of a still, mash and distilled spirits and the offense of working in a distillery.

He was sentenced to imprisonment for four years on three counts and one year on one count, all to run concurrenty. PA[1] p. 49a.

The Electronic Surveillance

For a long time before the indictment herein, petitioner had been the object of investigation by government agents who suspected that he was involved in alleged gambling activities. He was in close contact with a number of persons who were also suspected of similar activities.

About September 29, 1967, counsel for petitioner received reliable information that the telephone lines to petitioner's home had been unlawfully tapped and that conversations thereon had been monitored by means of electronic devices by agents of the Government. Counsel were also informed that petitioner's associates had been under investigation

[1] The reference "PA" is to the printed appendix of petitioner below in Appeal No. 17,802.

for a long time and that practically all their telephones had been unlawfully tapped for an extended period before the indictment of petitioner.

Counsel has now been informed that government agents of the Federal Bureau of Investigation or the Internal Revenue Service, or both, have tapes recording the voices of petitioner and his counsel, John R. Jones, Esquire, taken during the period after the indictment of petitioner and the trial of this cause and that the recordings are of telephone conferences between petitioner and his counsel with respect to his defense at the trial.

The brother of petitioner and one, Sam London, had installed a still and vats for fermentation in the third floor attic of petitioner's home in the first week of October, 1964, of which operation petitioner had no knowledge and in which he did not participate—JA[2] 31a-32a. However, petitioner's brother and Sam London talked on the telephone about the distilling operation at least once a day from the first part of October to the first part of November, 1964. JA 35a (stipulation).

Then, on October 30, 1964, out of the blue, for no given reason and without explanation, suddenly agents of the Alcohol and Tobacco Tax Division of the Treasury Department were busily engaged in the investigation of an illicit distillery in petitioner's home—RA[3] 1b-2b, 16b-17b. Nor can any explanation ever be given by them because all the notes and reports of the agents have been destroyed except such notes and reports as are identical with their testimony at the trial of this cause.

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[2] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

[3] The reference "RA" is to the printed appendix of respondent below in Appeal No. 17,802.

There has been no disclosure by the government of the source of any information which led to the commencement of the surveillance of petitioner's home by the agents of the Alcohol and Tobacco Tax Division. Absent a disclosure, the only inference is that the source of their information was a wire tap.

The lawless conduct of the agents in tapping wires then forced them to give false testimony in an attempt to conceal the facts of their wire tapping and wrongful search of petitioner's home. They falsely testified that on three ocasions prior to the execution of the search warrant, which was based on statements identical with their testimony, from a point on the sidewalk in front of petitioner's home, they smelled the odor of fermenting mash emanating from petitioner's home. RA 3b-4b. This testimony was false for two reasons: first, the wind was blowing from the wrong direction for them to have smelled anything as is proved by Exhibit C, the report of the Meteorologist in charge of The Weather Bureau, App., p. 5a and JA 19a-21a-34a, and, second, the mash was composed of water, sugar and yeast, RA 39b, which creates so little odor that it would not be discernible outside the room in which the vat was located, JA 14a-15a.

The agents felt perfectly safe in giving the false evidence, as a fruit of the wire tap, they knew there was a still in the attic of petitioner's home.

There is no doubt whatever that petitioner was the target of the agents' investigations because, even when petitioner's brother admitted responsibility for the still, he was not arrested. He was not even questioned, PA 24a. As to Patricia Hampton and Sam London, indicted with petitioner, there was a dismissal as to Patricia Hampton and Sam London pled guilty and was put on probation. However, no statements were taken from them. They were not

even questioned—and for a good reason—for, if they had been questioned, they would have sworn that petitioner had nothing to do with the still—that it was the operation of his brother—of which petitioner knew nothing.

The picture became clear when, on October 2, 1967, an electronics expert tested the telephone lines of petitioner's home and found that they were tapped. JA 28a. He also found evidence on March 3, 1963, indicating that a device had been removed from the telephone junction box at petitioner's home. JA 29a.

Discussion with James Z. Huckaby then disclosed that, prior to the execution of the search warrant, an agent had gained admission to the home and searched it by representing himself as a book salesman, JA 32a, and that agents had told him to keep silent and to move from petitioner's home, JA 31a-35a.

Then it became abundantly clear that a wire tap was the only possible explanation for the commencement of the investigation in the first place. It was the only explanation as to why a "book salesman" would seek to search the house and why agents would glibly give false testimony (they knew a still was there because of information received from the wire tap).

Coupled with the fact that petitioner was under suspicion of gambling, that he was in contact with others also under suspicion of the same activity and whose telephones have been admittedly monitored by wire taps, there can be no doubt that petitioner's telephone was tapped in October of 1964 and that when the agents failed to obtain evidence for prosecution for gambling, but learned of the still, they proceeded to "frame" petitioner on charges of bootlegging on the theory that he should be punished in one way or another for an offense (gambling) which they were unable to prove.

The agents have unanimously and blandly denied all knowledge of any electronic surveillance of petitioner. Of wire tapping, they know nothing, yet the record is eloquent in its silence as to the source of the information which launched the investigation of petitioner's home. Of course, the source was the wire tap—there is no other explanation.

REASONS FOR GRANTING THE WRIT

1. The first question presented by this petition concerns the problem of the burden of proof with respect to the use of electronic devices by government agents for surveillance. This problem has become of increasing importance to the people of this country with the development of electronics and the wholesale invasion of their privacy and their constitutional rights.

Simply stated, the problem has two aspects: secrecy versus revelation and millions for prosecution versus a paltry fund for defense (in practically every case).

It goes without saying that surveillance without secrecy would hardly be surveillance. It, therefore, follows that all facts and information of electronic surveillance must necessarily be peculiarly within the knowledge of the agents.

It is also readily understandable that electronic surveillance is most successfully used against people who do not have the financial ability to employ counter measures. The electronic equipment used by the agents represents the outlay of tremendous sums of money. Similarly, the electronic equipment essential for counter measures costs fortunes. Additionally, the men who are qualified and skilled to use the equipment are specialists who command very substantial compensation, in most cases far beyond the ability of the defendant to pay.

It would seem obvious that if defendants have to carry the burden of proving that unlawful means of surveillance were used against them, that defendants have an impossible task.

This burden was eased in *Black v. United States,* 385 US 26 (1966) when the government produced intra-bureau messages which established the use of information illegally acquired.

Then in *Shipani v. United States,* 385 US 372, the government adopted a program of review whereby a determination is made by the Department of Justice whether (1) there has been an electronic surveillance which is or may be unlawful and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved. This policy is at the mercy of the agents and the confidential informants who are able to throttle the good intentions of their superiors by destroying records—or better yet for their purposes, by not making any in the first instance. The realization that records are a disadvantage for them must have come to the agents in *Kolod v. United States,* No. 133, October Term, 1967, wherein they are involved in the problem of whether to produce or not to produce records. There is no necessity for agents to create problems for themselves. All this can be neatly avoided by not having records—which is the significant development in *Bernard McGarry v. United States,* No. 1184, October Term, 1967. It now appears that by employing a "confidential informant" paid from a special fund, to do the wire tapping and the monitoring, that the identity of the informant will be protected from disclosure, i.e., "whose identity the government was privileged to protect."[4]

[4] Memorandum for the United States in Opposition filed in McGarry v. United States, No. 1184, October Term, 1967.

When the confidential agent has erased the monitored conversations from the tapes in order that they may be reused for further monitoring (an outstanding and rare example of governmental economy) and refrains from making a written record—or, if one be made, that it be destroyed—then there is nothing which can be produced—and nothing can be proved.

This brings us to the case at bar in which the agents denied that there was any electronic surveillance and in which all records have been destroyed except such records which are identical with the testimony of the agents in court. True, no testimony of monitored conversations was offered in evidence. That would have been the exposure of themselves. The agents needed no records—and no tapes. All the "confidential informant" had to do was to whisper to an agent of the Alcohol and Tobacco Tax Unit "There is a still in the house at 289 Josephine Street."

The evil of this procedure is that the regular agents are not chargeable with knowledge of how the confidential informant obtained the information. For all they know, the informant obtained the information in a perfectly legal manner.

It is submitted that the only practical way to curb the unrestrained propensity of the "confidential informants" to engage in lawless conduct is a rule of law raising a presumption that the source of the agents' information leading to the discovery of the offense was an unlawful wire tap unless the government proves that the source of its information was legal.

This must be a sensitive point with the Department, because the Department was very quick to point out the legality of its source of information in *Kolod,* stating:

"The source of the government's information concerning this offense is patent."[5]

2. The second question concerns another problem of tremendous importance to the public. The secret agents have now arrogated to themselves the power of the judiciary. With their identity protected by the government and their reports destroyed and their tapes erased, these agents now sit as judges and determine whether a man is guilty of an offense and whether he should be punished either for that offense or unjustly for some other of which he is innocent. In history, the consequence of such unbridled power has been corruption.

In the days of Imperial Rome, the confidential agents detested by everyone could almost defy their masters. In 355 A.D., the Imperator Constantius issued an edict: "Those persons who . . . are called secret confidential agents . . . do not hesitate to commit to the foul shadows of prison those whom, in their own judgment, they think to be criminals."[6]

In another edict[7] issued by the same Imperator in 359 A.D., the attempt was made to regulate the corruption of the confidential agents[8] since it could not be suppressed.

In the case at bar, the lawless activities of the agents have violated the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

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[5] Memorandum for the United States in Opposition filed January 8, 1968, in Kolod v. United States, No. 133, October Term, 1967.

[6] Codex Theodosiani 6,29,1

[7] Codex Theodosiani 6,29,5

[8] The confidential agents were called "curiosi" while the regular secret agents, similar to ours, were called "agentes" or "agentes de rebus."

With the invention of the device of the "secret confidential informant" whose identity is protected from disclosure, no one in the government need know of anything improper or illegal. With the realization that written records brought them to grief in *Black*, the agents now destroy them as in *McGarry*. Admissions in *Kolod* gave rise to an investigation—so now, as in the case at bar, they deny everything.

Without question, the development of new and revolutionary devices for snooping and the invasion of privacy is taking place daily. The opportunity of acting as judges has become irresistible to the confidential agents. Since they must sit in judgment in secret, it is obvious that their reward will not be honor. A Star Chamber session—or the anonymous note dropped in the lion's mouth was slight compared to that which faces the public of the United States.

The great advances in electronics must be balanced by adjustments in the law less the public be oppressed due to advantages taken of inventions. It is submitted that the Hearsay Rule should be applied to government reports and records—without the exceptions of the account book or shop book rule. The cloak of concealment must be taken from "secret confidential informants."

In the case at bar, the only evidence adduced was the false testimony of the agents. There was nothing else—except an inference on an inference which is a fallacy.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

47 U.S.C., §605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any

part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103.

26 U.S.C., §5179. Registration of stills.

(a) Requirements. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section).

26 U.S.C., §5205 Stamps.

(a) (2) Containers of other distilled spirits. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. The provisions of this paragraph shall not apply to—(no exceptions).

26 U.S.C., §5222. Production, receipt, removal, and use of distilling materials.

(a) Production, removal, and use.—

(1) No mash, wort, or wash fit for distillation or for the production of distilled spirits shall be made or fermented in any building or on any premises other than on the bonded premises of a distilled spirits plant duly authorized to produce distilled spirits according to law; and no mash, wort, or wash so made or fermented shall be removed from any such premises before being distilled, except as authorized by the Secretary or his delegate; and no person other than an authorized distiller shall, by distillation or any other process, produce distilled spirits from any mash, wort, wash, or other material.

26 U.S.C., §5601. Criminal penalties.

(a) Offenses—Any person who—

(1) Unregistered stills.—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a).

• • •

(7) Unlawful production, removal, or use of material fit for production of distilled spirits.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled.

26 U.S.C., §5604. Penalties relating to stamps, marks, brands, and containers.

(a) General.—Any person who shall—

(1) Transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section.

26 U.S.C., §5681. Penalty relating to signs.

(c) Premises where no sign is placed or kept.—Every person who works in any distillery, or in any rectifying, distilled spirits bottling, or wholesale liquor establishment, on which no sign required by section 5115(a) or section 5180(a) is placed or kept, and every person who knowingly receives at, or carries or conveys any distilled spirits to or from any such distillery, or to or from any such rectifying, distilled spirits bottling, or wholesale liquor establishment, or who knowingly carries or delivers any grain, molasses or other raw material to any distillery on which said sign is not placed and kept, shall forfeit all vehicles, aircraft, or vessels used in carrying or conveying such property and shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Constitution of the United States.

Fourth Amendment—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Exhibit C

Report of Weather Bureau:

November 6, 1964	8 P.M.	SW 11 miles per hour
November 6, 1964	9 P.M.	SW 8 miles per hour
November 6, 1964	10 P.M.	SW 8 miles per hour
November 6, 1964	11 P.M.	WSW 13 miles per hour
November 8, 1964	8 P.M.	WSW 8 miles per hour

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted and sentenced on four counts charging unlawful possession of a still, the possession and fermentation of mash, unlawful possession of distilled spirits, and working in an unregistered distillery.[1]

[1] 26 U.S.C. 5179(a), 5205(a)(2), and 5222(a)(1), 5601(a)(1), and (7), 5604(a)(1), and 5681(c). Petitioner was acquitted on counts charging unlawful use of a still in a dwelling house and the production of distilled spirits.

While his appeal was pending he filed in the district court a motion for a new trial on the ground of newly discovered evidence, alleging, *inter alia*, governmental wiretapping with respect to the present case. Following a hearing, the district court denied the motion, finding the testimony concerning the putative wiretapping "fantastic." The appeal then proceeded; the court of appeals affirmed by order both the conviction and the denial of the motion for new trial (Pet. 6a).

Petitioner here raises only the question of electronic surveillance, which he alleges provided the impetus to the investigation in this case.

The investigation itself appears to have been straightforward. Agents of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service testified at trial that they were investigating an alleged illicit distillery at petitioner's premises between October 30 and November 10, 1964 (R. A. 1b).[2] On two occasions during the evening of November 6, 1964, and once on November 8, agents walking on a sidewalk fifteen to twenty feet from petitioner's front door detected the odor of fermenting whiskey mash (R. A. 3b-4b, 17b-18b). During this time, agents also observed petitioner and another engaged in activities (*e.g.*, the carrying of large bales of sugar and sacks apparently containing five-gallon jugs) which indicated that they were fermenting mash (R. A. 5b-11b). On the basis of these observations, the agents obtained a search warrant. Upon executing it, they

[2] "R.A.," petitioner's designation, refers to the government's appendix in the court of appeals, a copy of which is on file with the Clerk of this Court.

found in the attic three 220 gallon vats containing, at the time of the search, approximately 200 gallons of mash (R. A. 12b, 35b).

The agents did not disclose how they received the information which caused them to initiate the investigation.[3] The burden of the motion for new trial was that governmental wiretapping had taken place in October 1964, and was the source of this information. At the hearing, the claim proved to be based on assertions (1) that airport weather records showed wind direction and velocity negating the claim of the agents that they smelled mash; and (2) that, as shown in part by loose nuts found in petitioner's telephone terminal, a wiretap had been functioning on petitioner's telephone in October 1967, three years after the events leading to the instant prosecution. It was stipulated that, if called, petitioner's brother would testify that he had talked to another by telephone about the operation of the still at least once a day during October and November 1964 (Tr. 70-71).[4]

In an oral opinion rendered at the conclusion of the hearing, the trial court denied the motion for a new trial with the following statement (Tr. 85-86):

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[3] The affidavit of Agent Turner in support of a search warrant, recites in part that "On October 16, 1964 [he] received reliable information that an illicit distillery was being operated at a dwelling type house located at 289 Josephine Street, Detroit, Michigan" (Tr. 78).

[4] "Tr." refers to the transcript of the hearing relating to petitioner's motion for a new trial on grounds of newly discovered evidence. We are lodging a copy of this transcript with the Clerk of this Court.

Well, gentlemen, the motion for [a] new trial on the grounds of newly discovered evidence is a misnomer. There is no newly discovered evidence here.

As a matter of fact, there is very little that even qualified as evidence. Certainly the testimony of the expert witness is far from persuasive; the fact that there were certain wind currents out at the airport at a certain time of course doesn't mean that there could not have been variations in this area, local, transient. As a matter of fact, the witness wouldn't say that there couldn't be, obviously since he was sworn to tell the truth.

The whole point about what the wind was a couple of years later, and his substance he put on the porch is completely unpersuasive. We don't know anything about the conditions that existed at the time that this search warrant was made out other than the agents say they smelled it, and I find them not impeached in any way.

Certainly there is nothing newly discovered here.

The testimony about the wire tap is equally fantastic. To argue from the fact that there was a wire tap at this house at some recent time that there was a couple of years before, based in turn upon the testimony about the wind here, is getting into the realm of fantasy.

There is no evidence of any kind that would warrant a holding that there had been anything improper here in this case.

At the hearing, the Director of the Detroit District of the Internal Revenue Service and the Assistant Special Agent of the F.B.I. in charge of the Detroit

Office testified that they had no knowledge or records of any wiretap installed at petitioner's premises between September 1964 and October 1967 (Tr. 21-23). The Chief Special Investigator of the Alcohol and Tobacco Tax Division of the Treasury Department testified that he had no information of any electronic surveillance or wiretap on petitioner's lines or premises during September-November 1964 or October 1967 (Tr. 28, 31). Additionally, the Department of Justice, in accordance with its representation to the Court in *Schipani* v. *United States*, 385 U.S. 372 (No. 504, O.T. 1966), has undertaken to determine whether there was any electronic surveilance employed or utilized by the government in this case; it has found no indication that any such device was employed.[5]

Petitioner's arguments are based wholly on speculation. His suggestion, that the government be required to prove that anonymous or undisclosed sources of information leading to successful criminal investigations are "legal," is without merit.

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[5] There is also no evidence in support of petitioner's accusation (Pet. 4) that government agents indulged in selective destruction of records to conceal unlawful activity in this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

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REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION.

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REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION.

This reply memorandum is necessary to correct several errors in the Government's Memorandum in opposition.

First: In the last paragraph on page 2 in said Memorandum, it is stated that the agents observed the petitioner carrying large bales of sugar. The testimony of the agent (RA 7b) is that petitioner was carrying a "large bale or sack" and that the agent "had no doubt that the bag contained sugar."

Second: It is then stated that "which indicated that they were fermenting mash." There is nothing of the kind in the record.

Third: Following the above, the statement is made, "On the basis of these observations, the agents obtained a search warrant." This statement is clearly erroneous. The affidavit for the search warrant states that, on three occasions, the agent, walking on the sidewalk, "detected the odors of fermenting whiskey mash emanating from" petitioner's home. And this is identical with the agents' testimony in court (RA[1] 3b-4b, 17b-18b). This is an important point. The affidavit is not based on what the agents observed, but upon what they claim to have smelled when it was impossible for them to have smelled anything because (1) the wind was blowing from the agents to the petitioner's home, and (2) the "mash," composed of sugar, water and yeast, gave off only a minimal odor not discernible out of the room in which the container of the mash was located (JA 14a-17a).

Fourth: In the second paragraph on page 3, it is stated that petitioner's claim is based on assertions that the direction of the wind negated the claim of the agents that they smelled mash. Equally important—petitioner's claim is also based on the fact that there was nothing for the agents to have smelled irrespective of the direction of the wind. This fact the Government ignores, but mentions that "airport weather records showed wind direction. * * *" On page 4, to rebut the weather records, the Trial Judge is quoted saying, "out at the airport" and "the whole point about what the wind was a couple of years later." The direction and velocity of the wind was determined "in" at the Detroit City Airport Observatory (Exhibit C, JA 34a) which is not far from petitioner's home in the same northern area of Detroit.

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[1] "RA" refers to the Government's appendix in the Court of Appeals in Case No. 17.

The point to all of this is that the Government seeks to rebut the facts of the direction and velocity of the wind—but ignores completely the fact that the so-called "mash" gives off very little odor. Consequently, it should be taken as an admitted fact that there was nothing whatever that the agents could have smelled—irrespective of the direction of the winds.[2]

Fifth: The loose nuts had nothing to do with October, 1967, when Levett, an electronics expert, tested petitioner's telephone lines and found that a wire tap was on them (JA 29a). The loose nuts were found in petitioner's telephone terminal on March 3, 1968. A call had been made to petitioner informing him that Levett was coming to his home to test the telephone. A short time later, Levett arrived and found that the telephone was completely dead. Checking the wires, Levett found that the nuts in the terminal were loose. He tightened the nuts and restored the telephone to use. Also, the "loose nuts" had nothing to do with October and November, 1964. Beyond any doubt, the telephone call informing petitioner that Levett was coming to petitioner's home had been monitored. And then, someone removed a tap from petitioner's telephone terminal in such haste that he failed to tighten the nuts.

Sixth: In footnote 3 on page 3, it is stated that Agent Turner "received reliable information" that a still was in the house. "Reliable information" means a wire tap. If there had been an informer in the picture, Turner would have said that he had "received information from an informer who had been found to be reliable."

---

[2] The trial court also ignored the fact that the composition of the mash precluded there being any discernible odors—confining himself to seeking to rebut the direction of the winds. The Government introduced no evidence whatever to rebut the testimony that the "mash" gave off but little odor.

It follows that the testimony of the agents was palpably false. Without such testimony, there was no evidence in the case—only an inference on an inference. The verdict of the jury was not supported by any evidence.

The only way the agents could have located the still was by information obtained from electronic surveillance.

The Department of Justice has not answered whether there was electronic surveillance or not, but states, "it has found no indication that any such device was employed."

It is true that "no indications" can be found because the records of the agents have been destroyed, except such records as are identical with the testimony of the agents. The Government asserts that there is no evidence in support of petitioner's accusation that agents destroyed records. However, the Government does not state that the records were not destroyed as a matter of fact.

If the Government had examined the records, the fact of the destruction of records would have been known to the Government.

In answer to a motion, Howard E. O'Leary, Esquire, Assistant United States Attorney, produced the records at a meeting in his office in the Federal Building in Detroit, Michigan, at 3:00 o'clock, P.M., on Monday, February 26, 1968, and, in the presence of Orville J. Turner, an agent, explained the paucity of the records by stating that the rest of the records had been destroyed in the course of their regular procedures.

If the Department of Justice had sought information about wire taps, the fact of the destruction of the records would be known to it.

Consequently, it would appear that no effort has been made to answer the question whether or not the agents indulged in electronic surveillance.

Petitioner respectfully requests that the Department of Justice answer whether there was or was not electronic surveillance of petitioner.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES EASLY,

Counsel for Petitioner.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

Nos. 394 and 576.

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

MOTION FOR A LEAVE TO FILE PETITION FOR REHEARING AND MOTION OUT OF TIME.

JAMES EASLY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR A LEAVE TO FILE PETITION FOR REHEARING AND MOTION OUT OF TIME.

James Easly, counsel for petitioner, Cullen Huckaby, and on his behalf, respectfully requests leave to file the attached petition for rehearing and motion for disclosure of electronic surveillance out of time for the reason that James Easly has been ill for the past ten days and has been confined to his bed for the past week and he prepared the attached petition at home without the benefit of any reference books and from memory misconstrued the rule as providing thirty days instead of twenty-five days for the filing of the petition.

Respectfully submitted,

JAMES EASLY,
521 Terminal Tower Bldg.,
Cleveland, Ohio 44113,
Counsel for Petitioner.

SEP 27

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 576

CULLEN HUCKABY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

James Ellet,
[illegible] Terminal Tower Bldg.,
Cleveland, Ohio 44113
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner, Cullen Huckaby, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 17, 1968, dismissing Appeal No. 18,759 from the judgment entered by the United States District Court for the Eastern District of Michigan, Southern Division, on March 18, 1968.

OPINIONS.

The District Judge rendered an oral unreported opinion which is set forth in Appendix A, *infra*. The opinion of the Court of Appeals for the Sixth Circuit is set forth in Appendix B, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 17, 1968 (Appendix C, *infra*). This Petition was filed on September 27th, 1968. The Court of Appeals has stayed its mandate until the Petition for Certiorari, No. 394, will have been finally determined.

The jurisdiction of the Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED.

1. Whether the District Judge at the hearing of petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence committed an abuse of discretion when he announced, shortly after taking of testimony had commenced:

> "We are not going to try this case twice. And that is my ruling." (JA[1] p. 15.)

2. Whether the Trial Judge abused his discretion in denying petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Rule 33 of the Federal Rules of Criminal Procedure (Appendix D, *infra*). The following appear in the appendix to the Petition for a Writ of Certiorari, No. 394: 26 U.S.C., sections 5179(a)(1), 5205(a)(2), 5222(a)(1), 5601(a)(1) and (7), 5604(a)(1) and 5681(c). Section 605 of the Communications Act of 1934. The Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

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[1] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

STATEMENT.

Petitioner was convicted on his plea of not guilty by a jury under the sections of Title 26, *supra*, of the offense of possession of a still, mash and distilled spirits and the offense of working in a distillery.

At the trial, agents testified that, standing on the sidewalk, they smelled odors of fermenting mash emanating from petitioner's home, i.e., on November 6, 1964, at approximately 8:20, P.M. (RA 3b), November 6, 1964, at 10:25 P.M. (RA 3b), November 8, 1964, at 8:00 P.M. (RA 17b).[2] At the times the agents claimed to have smelled such odors, the wind was blowing from them towards petitioner's home which is in the same northern area of Detroit as the Detroit City Airport Observatory where the direction and velocity of the winds were taken (Appendix E, *infra*).

Petitioner's home is located on the north side of Josephine Street which runs in a west-southwest direction (JA 19a, Exhibit D.)[3]

However, irrespective of the direction of the winds, the so-called "mash" was composed of sugar, water and yeast[4] which gives off so little odor that it probably would not be discernible outside the room in which the vats were located, certainly not outside the house (JA 13a-17a).

The testimony of the agents is clearly proven to be false for two reasons, i.e., the direction of the wind and

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[2] The reference "RA" is to the printed Appendix of Respondent in Appeal No. 17802.

[3] Plat of Josephine Street showing petitioner's home—received in evidence as Defendant's Exhibit D and lodged with this Court.

[4] Page 39b of the Government's printed Appendix in Appeal No. 17802, pp. 144, 161, 164 of the trial transcript in case No. 394.

the lack of odor from the mash, either one of which is adequate to establish the falsity of the agents' testimony.

The false testimony of the agents has two facets. As set forth in Petition for Certiorari, No. 394, the false testimony, together with the testimony of Levett,[5] the electronics expert, leads inescapably to the conclusion that electronic surveillance was the means employed for the discovery of the offense, and, further, upon eliminating such false testimony, there is no evidence to sustain the conviction.

In the case at bar, the false testimony constitutes newly discovered evidence which is grounds for a new trial and which the agents felt secure in giving because they were fortified with information received from the electronic surveillance.

REASONS FOR GRANTING THE WRIT.

1. The Trial Judge committed an abuse of discretion when he announced, shortly after the taking of testimony had commenced: "We are not going to try this case twice. And that is my ruling."

Such a statement clearly establishes that the Trial Judge had decided to deny petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence before he had heard the greater part of the testimony in support of the motion. He had already made up his mind when he said, "We are not going to try this case twice," and then he authenticated his opinion with "And that is my ruling."

This is clearly a case of prejudgment. In *Knapp v. Kinsey* (C.A. 6th, 1956), 232 F. 2d 458, cert. den. 352 U.S. 892, Miller, Circuit Judge, speaking for the court, said on page 465:

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[5] JA 27a-30a.

"One of the fundamental rights under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case."

In *Moskun v. United States* (C.C.A., 6th Cir., 1944), 143 F. 2d 129, the Circuit Court reversed the trial court and remanded the case for retrial by another Judge. The first Judge had given an exhibition of prejudice.

The statement of the Trial Judge is a conclusive demonstration of prejudgment and absolute proof that petitioner did not receive a fair trial to which he was entitled.

2. The Trial Judge abused his discretion in denying petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence.

Not only did the Trial Judge deprive petitioner of his right to a fair trial by prejudging the evidence before he had heard it, additionally he committed an abuse of discretion by denying petitioner's motion. Rule 33, Federal Rules of Criminal Procedure. (Appendix D, *infra.*) *U. S. v. Lewis* (C.A., 6th Cir., 1964), 338 F. 2d 137.

False testimony of a material witness constitutes newly discovered evidence. *Larrison v. U. S.* (CCA, 7th Cir., 1928), 24 F. 2d 82.

In *Mesarosh v. U. S.* (1956), 352 U. S. 1, the court held that the conviction of appellant was tainted by false testimony and said on page 9:

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony."

False beyond measure was the testimony of the agents that they could smell the odor of mash emanating from petitioner's home when (1) the wind was blowing in the

wrong direction and (2) the composition of the mash was such that no discernible odor was given off.

The Trial Judge in his oral opinion (App. A, *infra*) ignored completely the fact that there was no discernible odor for the agents to smell. He confined himself to speculating about changes in the winds for which there was no evidence whatever.

The opinion of the Court of Appeals (App. B, *infra*) also avoids facing the fact of the composition of the "mash" and relies on the Trial Judge's speculation about the winds.[6]

Not one word of testimony, not one piece of evidence was introduced by the Government to rebut in any degree whatever the report of the United States Weather Bureau (Appendix E, *infra*) or the testimony of Dr. Hooper that a "mash" of sugar, water and yeast gives off no discernible odor (JA 16a).

In order that it be the grounds for a new trial, the false testimony must be material. The clear test of that in the case at bar is that, when the false testimony is disregarded, there is no evidence remaining, except an inference on an inference—that, at night, a man was identified as petitioner by reason of a multicolored sweater worn by the man, when it was never established that petitioner ever wore the sweater. (Tr. pp. 8, 17, 32, 50, 78.)[7]

From the foregoing, the Trial Judge should have been reasonably well satisfied that, without the false testimony, the jury would have reached a different verdict.

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[6] The Government has also consistently ignored the lack of odor of the mash. Its memorandum in opposition to Petition No. 394 avoids entirely these facts.

[7] The reference "Tr" is to the trial transcript filed in case No. 394.

The affidavit of the brother of petitioner (JA 31a-34a-35a) accepted as evidence in lieu of his testimony, fully explains all that had happened. The wire tap disclosed the offense and led to the unlawful search undertaken to verify information obtained from the tap. The affidavit for a search warrant based on the claim that the agents smelled the odor of mash emanating from petitioner's home was necessary—for certainly the grounds could not be based on the unlawful search. To the agents, there was no problem about the affidavit because they knew from information obtained from the unlawful search that there was a still in the attic. As to the winds or the odors, they did not give a thought. In all probability, they were not even at the scene. If they had been, they would have noticed the direction of the wind.

When arrested, petitioner disclaimed all knowledge and said responsibility for the still was his brother's. Yet, the brother was not arrested. He was not even questioned.

At the trial, the brother testified that he was responsible for the still. Again, he was not investigated—nor was he prosecuted—neither for the still—nor for his testimony, if the same had been false.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

JAMES EASLY,
Counsel for Petitioner.

APPENDIX A.

Oral Opinion of District Court.

The Court: Well, gentlemen, the motion for new trial on the grounds of newly discovered evidence is a misnomer. There is no newly discovered evidence here.

As a matter of fact, there is very little that even qualifies as evidence. Certainly the testimony of the expert witness is far from persuasive; the fact that there were certain wind currents out at the airport at a certain time of course doesn't mean that there could not have been variations in this area, local, transient. As a matter of fact, the witness wouldn't say that there couldn't be, obviously since he was sworn to tell the truth.

The whole point about what the wind was a couple of years later, and his substance he put on the porch is completely unpersuasive. We don't know anything about the conditions that existed at the time that this search warrant was made out other than the agents say they smelled it, and I find them not impeached in any way.

Certainly there is nothing newly discovered here.

The testimony about the wire tap is equally fantastic. To argue from the fact that there was a wire tap at this house at some recent time that there was a couple of years before, based in turn upon the testimony about the wind here, is getting into the realm of fantasy.

There is no evidence of any kind that would warrant a holding that there had been anything improper here in this case.

The agents have testified they didn't get into the house.

And the test of the matter here, the thing in the affidavit of Huckaby, in the light of what has transpired here, the agents' testimony, it is inherently incredible. He has

an agent saying, "I see you have a still in operation upstairs. It doesn't appear to be yours."

Well, the affidavit itself is contradictory with the sworn testimony at the trial in important particulars. Even if the testimony about the wind were relevant, it is not persuasive and it certainly is not newly discovered.

However, the court heard this without a jury and I am going to let it stand. But I will tell you frankly, gentlemen, that it is about the least persuasive of anything I have ever heard on this bench.

The idea that a man can go out there years later and testify what the wind was back in October and November, years prior thereto, is ridiculous. The testimony doesn't sustain the position you have taken. This Doctor can't testify what the wind conditions were at that time. And if you observe his testimony carefully you will see that he doesn't.

This thing about the agent threatening to kill this man, and so forth, and $15 passing back and forth—there is nothing to sustain all this.

And I can't help but observe, gentlemen, that we hear a lot these days about law and order and observing lawful authority. You know, we travel on a two-way street. Yes, of course the agents and the government are going to have to observe law and order. There are certain requirements that are placed upon our citizens.

Now, this man has been found guilty by a jury after a fair trial conducted by distinguished counsel who was alert, zealous, and impressive in his behalf.

The motion is denied.

APPENDIX B.

Opinion of the United States Court of Appeals for the Sixth Circuit.

(Decided September 17, 1968.)

Before: O'SULLIVAN, PHILLIPS and CELEBREZZE, Circuit Judges.

PER CURIAM. On July 15, 1968, an unpublished order in case No. 17,802 was entered affirming the conviction of appellant for the offense of possession of a still, mash and distilled spirits and working in a distillery in violation of 26 U.S.C. §§ 5179(a) (1), 5205 (a) (2), 5222 (a) (1), 5601 (a) (1), 5601 (a) (7), 5604 (a) (1) and 5681 (c).

Appellant has filed a separate appeal from the judgment of the District Court denying a new trial on grounds of newly discovered evidence. At the trial federal alcohol tax investigators testified that on November 6 and November 8, 1964, while walking on the sidewalk in front of the premises at 289 Josephine Street, Detroit, Michigan, they smelled odors of fermenting mash emanating from those premises. One of the investigators testified that on the day the search warrant was executed, November 10, 1964, he detected the odor of fermenting whiskey mash coming from the direction of the premises.

The newly discovered evidence introduced by appellant at the evidentiary hearing on the motion for a new trial was principally to the effect that at the times and on the dates involved, the wind was blowing in the opposite direction from the sidewalk where the alcohol tax investigators were located and the investigators could not have smelled the odor of fermenting mash from the five illicit stills operated in the attic of the premises. Upon the basis of this testimony appellant contends that the District Judge should have been reasonably well satisfied that the testi-

mony given by three material witnesses for the Government was false and that, if the jury could have heard the testimony concerning the direction the wind was blowing, they might have reached a different conclusion.

At the end of the evidentiary hearing the District Judge commented from the bench: "I will tell you frankly, gentlemen, that this is about the least persuasive of anything I have ever heard from this bench."

Upon consideration of the briefs and appendix of appellant and after reading the entire transcript of the proceedings on the motion for a new trial on grounds of newly discovered evidence, the Court holds that the record conclusively demonstrates no abuse of discretion by the District Judge in denying the motion for a new trial.

The appeal is dismissed as frivolous and entirely without merit. Rule 9, Supplementary Rules of this Court.

APPENDIX C.

Order Dismissing Appeal.

(Entered September 17, 1968.)

It is ordered that this appeal be and it is dismissed pursuant to opinion this day filed.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Rule 33 of the Federal Rules of Criminal Procedure.

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

APPENDIX E.

Weather Bureau Report.

UNITED STATES DEPARTMENT OF COMMERCE
WEATHER BUREAU

Station Weather Bureau, Detroit Date October 4, 1967

I hereby certify that records of the U. S. Weather Bureau indicate at the Detroit City Airport Observatory the wind records were:

November 6, 1964	8 p.m.	SW	11 miles per hour
November 6, 1964	9 p.m.	SW	8 miles per hour
November 6, 1964	10 p.m.	SW	8 miles per hour
November 6, 1964	11 p.m.	WSW	13 miles per hour
November 8, 1964	8 p.m.	WSW	8 miles per hour

FLOYD H. PEARSON
(Acting) *Meteorologist in Charge.*

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 576

CULLEN HUCKABY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted and sentenced on four counts charging unlawful possession of a still, the possession and fermentation of mash, unlawful possession of distilled spirits, and working in an unregistered distillery. While his appeal was pending, he filed in the district court a motion for a new trial on the ground of newly discovered evidence, alleging, inter alia, governmental wiretapping with respect to the present case. Following a hearing, the district judge denied the motion, finding the testimony concerning the alleged wiretapping "fantastic" (Pet. 8). The appeal

then proceeded; the court of appeals entered an order apparently affirming both the conviction and the denial of the motion for a new trial (see Pet. 6a in No. 394, this Term).

In No. 394, this Term, petitioner has filed a petition for a writ of certiorari from the court of appeals' order raising only the questions which he had made the ground of his motion for a new trial. After the government's response to that petition had been filed, the court of appeals issued an opinion (Pet. 10-11) specifically affirming the district court's denial of new trial, from which ruling petitioner had taken a separate appeal (see Pet. App. B). The instant petition for a writ of certiorari seeks review of this decision.

As in No. 394, this Term, there is no occasion for review by this Court. The court below found insubstantial, as had the district court, the claim that the alcohol and tax agents had committed perjury when they testified that they had smelled the odor of fermenting mash fifteen or twenty feet from petitioner's house (see Pet. App. A & B.). Moreover, as we pointed out in our Brief in Opposition in No. 394 (pp. 4-5), there is not the slightest factual support for the contention that there was governmental electronic surveillance in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 576.

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM AND MOTION OF PETITIONER.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM AND MOTION OF PETITIONER.

The Government's Memorandum in Opposition is founded upon:

First: The finding of the district judge that the testimony concerning the wire tapping was "fantastic." The Government and the Court of Appeals for the Sixth Circuit ignore completely that the finding of "fantastic" was made by a district judge, who, before he had heard the greater part of the testimony, announced "We are not going to try this case twice. And that is my ruling." (JA,[1] p. 15.) This prejudgment of petitioner's motion by the

[1] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

district judge would seem to be a clear denial of justice to petitioner.

Second: The Government then states that the Court of Appeals entered an order (in Appeal No. 17,802) "apparently affirming both the conviction and the denial of the motion for a new trial" on the grounds of newly discovered evidence which had been docketed under No. 18,759 (see Pet. 6a in No. 394, this Term), but the Government does not state the rest of the facts, i.e.:

From the order of the district judge denying petitioner's motion for a new trial, petitioner appealed (No. 18,759 on the docket of the Court of Appeals for the Sixth Circuit). On the same day, July 15, 1968, that petitioner's brief and the joint appendix were filed, the Court of Appeals, as stated by the Government, undertook to affirm the conviction and deny the motion for a new trial by a single entry on the docket in Appeal No. 17,802 and without making any entry on the docket in Appeal No. 18,759. In so doing, the Court of Appeals deprived petitioner of a hearing in Appeal No. 18,759, and, additionally, gave no consideration to the district judge's prejudgment of the motion for a new trial. In fact, it would appear that the action of the Court of Appeals was a prejudgment and a denial of justice to petitioner.

Thereafter, on September 17, 1968, without having afforded petitioner a hearing in Appeal No. 18,759, the Court of Appeals dismissed the appeal as "frivolous and entirely without merit" and entered the order on the docket in No. 18,759. In its opinion (see App. B—petition in this proceeding), the Court of Appeals refers to the direction of the wind in connection with the detection of the odor of fermenting mash by the agents, but ignores completely the fact that the "mash," composed of water, sugar and yeast gave off no odors discernible outside the

attic of petitioner's home. And, in the memoranda in opposition filed herein and in No. 394 (this Term), the Government not only has ignored the fact that there was no odor to be detected irrespective of the direction of the wind, but has also ignored the prejudgment, not only of the district judge, but of the Court of Appeals as well.

Third: The Government then relies on the statement in its Brief in Opposition in No. 394 (p. 5): "Additionally, the Department of Justice * * * has undertaken to determine whether there was any electronic surveillance employed or utilized by the Government in this case; it has found no indication that any such device was employed."

This is a far cry from the action of the Department in *Giordano v. United States*, No. 1070, October Term, 1967, in which the Solicitor General, apparently for no reason whatever, gratuitously announced that electronic surveillance had been employed by government agents and recommended that proceedings against the defendants therein be terminated.

Particularly fascinating becomes this frank divulgence of illegal activities of the agents in *Giordano* when it is realized that at no time during that litigation did any one claim that there had been any electronic surveillance whatever of the defendants. Indeed, it can be said that petitioner, Giordano, was taken completely by surprise at the disclosure made by the Solicitor General because he had never had any reason whatever to even suspect that he had been the object of electronic surveillance. Examination of the transcript of the evidence in *Giordano* reveals that there is nothing in the testimony which even remotely suggests that there had been any electronic surveillance. Said transcript contains ample evidence of the source of the government's first information of the offense and shows that the evidence was legally obtained.

It would seem that there is no apparent motive for the open handed generosity of the Solicitor General in making the admission that there was illegal electronic surveillance in *Giordano*, unless one examines the transcript of post conviction proceedings in the District Court when the judge asked why Giordano (a mere employee of the bankrupt corporation) had been made a defendant (co-conspirator) and the Assistant United States attorney replied that Giordano had been made a defendant because he refused to testify for the government.

The argument in regard to the improper joinder of Giordano as a co-conspirator appears on pp. 23-29 of Giordano's petition, No. 1070, September Term, 1967, from which the motive for the recommendation for dismissal of the case on the grounds of electronic surveillance becomes very clear, indeed. Confronted with the thorny problem created by the conviction of Giordano as a co-conspirator which presented to this Court the picture of the use by the Department of Justice of the conspiracy statute as a crowbar to compel the giving of testimony and which might have resulted in a decision of this Court hampering such use of the conspiracy statute, the Solicitor General admitted electronic surveillance. It now appears that in addition to the representation of the Department of Justice anounced in *Schipani*,[2] there is a different and a new approach for the disclosure of illegal electronic surveillance which, perhaps, may be entitled the "Rule in *Giordano*."

In glaring contrast to *Giordano* is the case at bar where electronic surveillance was the only possible source of the information obtained by the agents. Additionally, the Solicitor General has never in any way denied that there was electronic surveillance of petitioner—he has

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[2] *Schipani v. United States*, 385 U.S. 372.

only said that (The Department) "has found no indication that any such device was employed." [3]

A very substantial reason for the reluctance of the Department to disclose the fact of electronic surveillance is that the tapes of the wiretap disclose that petitioner's brother was responsible for the operation of the still and that petitioner had nothing to do with it.

All the fruit of the wiretap is exculpatory of the petitioner and it has been concealed for this reason. Consequently, it cannot now be revealed without causing possible embarrassment to the agents.

As in No. 394, this Term, the Solicitor General has evaded answering whether there was, or there was not, electronic surveillance of petitioner's home, stating on page 2 of his memorandum in opposition filed herein, "Moreover, as we pointed out in our Brief in Opposition in No. 394 (pp. 4-5), there is not the slightest factual support for the contention that there was governmental electronic surveillance in this case."

It is now clear that the Solicitor General will not answer whether or not there was electronic surveillance of petitioner's home. Therefore, it is respectfully submitted that the following motion *should be granted.*

MOTION.

Petitioner, through his counsel, respectfully moves the Court that a rebuttable presumption be considered to have arisen to the effect that the evidence obtained for the prosecution of petitioner was the result of illegal electronic surveillance which presumption may be rebutted by proof on the part of the government that such *evidence was obtained* by legal means.

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[3] P. 5, Memorandum in Opposition of Solicitor General in No. 394, this Term.

If, by any chance, it should be that the Department of Justice is unable to control its own agents so as to effectively prevent them from using electronic devices for illegal surveillance, it is submitted that the granting of the above motion by this court will be of material assistance to the Department in its efforts to curb the unlawful propensities of the agents who will stand completely exposed if they will have been unable to prove that they obtained the evidence by legal means and who will then realize that the obtaining of evidence by illegal electronic surveillance may as well be terminated.

Petitioner anticipates that the method set forth above for the discipline of the agents will be appreciatively received by the Department and that the Solicitor General will join petitioner in urging this Court to grant the above motion.

CONCLUSION.

It is, therefore, respectfully submitted that petitioner's motion should be granted, if the Department of Justice has no proof to rebut the presumption, then the judgments of the lower courts should be reversed and the case be dismissed; if the Department does have any such evidence, then the case should be remanded to the District Court for the determination of the legality of the same, or, in the alternative, that the petitions for writs of certiorari should be granted.

JAMES EASLY,

Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 576

CULLEN HUCKABY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Petitioner's "Reply Memorandum and Motion," makes appropriate the following further statement:

(1) As previously stated (Memorandum in Opposition in No. 394, pp. 4–5; Memorandum in Opposition in this case, p. 2), there is no evidence of governmental electronic surveillance in the record, and an independent investigation conducted by the Department of Justice discloses no indication of any such eavesdropping by the government.

(2) We have no knowledge of the "tapes of the wiretap" referred to on page 5 of petitioner's Reply Memorandum. If, as petitioner implies by describing their contents, he has seen or heard such tapes, it is

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difficult to appreciate why that fact was not put forward in the district court hearing on his motion for new trial.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

NO. 576

Vide No. 394 for motion for leave to file petition for rehearing (filed Dec 13, 1968)